Supreme Court of the United States

OCTOBER TERM, 1938

No. 9

GUARANTY TRUST COMPANY OF NEW YORK,
EXECUTOR OF THE ESTATE OF MARY T. RYAN,
DECEASED, *Petitioner*,

vs.

COMMONWEALTH OF VIRGINIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA.

Brief on Behalf of Commonwealth of Virginia

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OPINION BELOW

The opinion below is officially reported in Volume 169, of the Virginia Reports, beginning at page 414, under the style of *Mary T. Ryan* v. *Commonwealth of Virginia.*

STATEMENT OF THE CASE

Mrs. Mary T. Ryan, widow of Thomas F. Ryan, for a number of years prior to her death[1] maintained her actual and her legal residence in Virginia (R. p. 30). During these years she received income from a trust, composed of stocks and bonds, held, managed and controlled by a trustee in New York under the will of Mr. Ryan probated in New York as the will of a resident of that State (R. pp. 30, 31, 32).

Mrs. Ryan's only interest in the trust was the right to receive a part of the income therefrom under the following conditions:

> "Twelve (12) of said equal parts to said Trustees in trust to receive the income therefrom, and to pay over such part of said income to my dear wife, Mary T. Ryan, as they in their sole discretion may determine to be necessary and proper for her care, support and comfort during her life, in such installments and at such intervals as they in their sole discretion may determine" (R. p. 32).

New York assessed a State income tax against the trustees on the entire net income of the trust, out of which income the payments were made to Mrs. Ryan (R. p. 32). Virginia assessed ordinary State income taxes against Mrs. Ryan on account of that portion of the income paid her by the New York trustees. The Virginia taxes were paid and a refund was sought in the Circuit Court of Nelson County, Virginia, under ap-

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[1]The taxes here involved were assessed against Mrs. Ryan during her lifetime. After the decision of the court below Mrs. Ryan died, and by order of the Supreme Court of Appeals of Virginia the cause was revived in the name of her executor, Guaranty Trust Company of New York (R. p. 42).

propriate statutes. Relief was denied by that court and its judgment was affirmed by the Supreme Court of Appeals of Virginia. This court granted certiorari March 28, 1938.

Relief was sought in the court below on two grounds, after counsel for petitioner had abandoned two other grounds advanced in the original petition. These two grounds relied on in the court below were:

First: The Virginia statutes were said not to have the intent of taxing the income paid Mrs. Ryan from the New York trust (R. pp. 3, 4) and

Second: Even if the tax were intended, it was claimed that its levy violates the "Due Process Clause" of the Constitution of the United States (R. p. 15).

The first ground, involving solely a question of the construction of Virginia statutes and having been decided adversely to petitioner by the court below, is, of course, not advanced here.

Petitioner now relies on the second ground advanced in the court below, and further contends that Virginia's tax against Mrs. Ryan constitutes a denial to her of the equal protection of the laws. This latter contention was not raised, considered or argued in the court below.

STATUTES INVOLVED

Many sections of the Tax Code of Virginia bear upon the assessments, but it is sufficient here to refer to the following:

Section 24, (Michie's Code of Virginia, 1936, p. 2404)
Section 27, (Id. p. 2405)

Section 38, (Id. p. 2407)
Section 39, (Id. p. 2408)
Section 40, (Id. p. 2408)
Section 50, (Id. p. 2410)

Pertinent portions of these sections are printed in an appendix hereto.

SUMMARY OF ARGUMENT

Final judgment of the court below was entered on November 11, 1937, and petition for writ of certiorari was filed in this court on February 21, 1938, more than three months subsequent to the entry of such final judgment. Therefore, writ of certiorari should be dismissed because the petition was not filed within the time prescribed by law.

Petitioner's decedent, Mrs. Mary T. Ryan, a resident of and domiciled in the State of Virginia, was during her lifetime assessed with a Virginia State income tax and included in the base of such tax was income received by Mrs. Ryan as beneficiary in part of a trust consisting of intangible property, held, managed and controlled by New York trustees. The Virginia income tax is imposed upon its residents for the protection that they receive under its laws in their persons and in the receipt and enjoyment of their income and because they should bear their proportionate part of the expense of the government which affords this protection. The Virginia exaction is an excise tax imposed upon the person and not a tax upon property from which income may be derived. Mrs. Ryan was not denied due process of law by including in the base of the Virginia tax income received by her from the New York trust, even though the trustees may have been taxed on account of the en-

tire income from the trust under the laws of New York, the jurisdiction of Virginia to impose its tax having been clearly established by this court, notably in *Lawrence* v. *Mississippi*, 286 U. S. 276, and *New York, ex rel. Cohn* v. *Graves*, 300 U. S. 308. The New York income tax on the trustees is imposed upon a different legal entity for different privileges and protection afforded under the laws of that State.

Denial of the equal protection of the laws was not raised or considered in the court below and should not be considered for the first time in this court. In any event, there is no denial of equal protection to Mrs. Ryan, since all persons similarly situated are taxed alike under Virginia law.

ARGUMENT

I.

The Petition Was Not Filed in Time

Counsel for respondent, in a brief filed in this cause opposing the granting of a writ of certiorari, endeavored to show that the petition for the writ was not filed by petitioner within the time prescribed by statute. It is believed that the record herein, especially pages 42 and 51, demonstrates this contention to be sound, and it is again respectfully made, but for the sake of brevity the argument heretofore made will not be repeated except by reference to brief of respondent opposing the writ, pages 3 to 8 inclusive.

H.

The Due Process Clause of the Fourteenth Amendment does not Deny the Right to Virginia to Tax the Income of its Resident Beneficiary, even Though New York may have Taxed the Income of her Resident Trustees.[2]

The discussion under the due process clause logically falls in two divisions:

A. Virginia has inherent jurisdiction to impose a tax upon the entire net income of its residents, regardless of whether such income is derived from property located within or without the State.

B. The inherent jurisdiction of Virginia to impose a tax upon the entire net income of a resident of the State is not defeated, divested, or ousted by the fact the income is derived from a trust, the corpus of which is managed and administered in New York, and that such trust was so created as to subject the trustees to a New York tax upon the income therefrom.

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[2]Respondent's brief opposing the granting of a writ of certiorari contained a short discussion of the case upon its merits. However, counsel feeling that the argument should be somewhat elaborated, this brief is being filed, and for the convenience of the court the entire argument on the merits is incorporated herein.

A.

VIRGINIA HAS INHERENT JURISDICTION TO IMPOSE A TAX UPON THE ENTIRE NET INCOME OF ITS RESIDENTS, REGARDLESS OF WHETHER SUCH INCOME IS DERIVED FROM PROPERTY LOCATED WITHIN OR WITHOUT THE STATE.

Decisions of this court squarely support the above assertion. *Lawrence* v. *Mississippi*, 286 U. S. 276; *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308; *Shaffer* v. *Carter*, 252 U. S. 37; *Maguire* v. *Trefry*, 253 U. S. 12. As was said in *Shaffer* v. *Carter, supra:*

> "Income taxes are a recognized method of distributing the burdens of government, favored because requiring contributions from those who realize current pecuniary benefits under the protection of the government, and because the tax may be readily proportioned to their ability to pay. Taxes of this character were imposed by several of the states at or shortly after the adoption of the Federal Constitution"[3] (252 U. S. 51).

And later in the opinion at page 57:

> "As to residents, it may, and does, exert its taxing power over their income from all sources, whether within or without the state, * * *."

[3]Virginia's entrance into the field of income taxation was an early one. Stauffer in his work on "Taxation in Virginia" (The Century Company, 1931) says, at page 98, that evidences of an income tax are found as early as the Revolutionary period. Since 1869 the tax has been imposed on the entire net income (above the personal exemption) of its residents from all sources. In fact, the definition of income in the Act of 1869 (Acts of Assembly 1869-70, pp. 294, 355) closely parallels that contained in section 24 of the Tax Code of Virginia.

In *Lawrence* v. *Mississippi, supra*, the Mississippi net income tax upon its resident was upheld, although the base of the tax included "income derived wholly from activities carried on outside the state," the opinion holding that:

> "The obligation of one domiciled within a state to pay taxes there, arises from the unilateral action of the state government in the exercise of the most plenary of sovereign powers, that to raise revenue to defray the expenses of government and to distribute its burdens equably among those who enjoy its benefits. Hence, domicile in itself establishes a basis for taxation. Enjoyment of the privileges of residence within the state, and the attendant right to invoke the protection of its laws, are inseparable from the responsibility for sharing the costs of government. * * * The Federal Constitution imposes on the states no particular modes of taxation and apart from the specific grant to the federal government of the exclusive power to levy certain limited classes of taxes and to regulate interstate and foreign commerce, it leaves the states unrestricted in their power to tax those domiciled within them so long as the tax imposed is upon property within the state or on privileges enjoyed there, and is not so palpably arbitrary or unreasonable as to infringe the Fourteenth Amendment * * *" (286 U. S. 279)

New York ex rel. Cohn v. *Graves, supra*, sustained the net income tax of New York imposed on its resident although included in the income taxed were rents received from New Jersey real estate. This court there said:

> "Here the subject of the tax is the receipt of income by a resident of the taxing state, and is within

its taxing power, even though derived from property beyond its reach" (300 U. S. 316).

So in *Maguire* v. *Trefry, supra,* closely analogous here on the facts, Massachusetts' tax on its resident's income from bonds held in trust and administered in another State was upheld.

"That the receipt of income by a resident of the territory of a taxing sovereignty is a taxable event is universally recognized. Domicil itself affords a basis for such taxation. Enjoyment of the privileges of residence in the state and the attendant right to invoke the protection of its laws are inseparable from responsibility for sharing the costs of government. 'Taxes are what we pay for civilized society,' see *Compania General de Tabacos* v. *Collector,* 275 U. S. 87, 100. A tax measured by the net income of residents is an equitable method of distributing the burdens of government among those who are privileged to enjoy its benefits. The tax, which is apportioned to the ability of the taxpayer to pay it, is founded upon the protection afforded by the state to the recipient of the income in his person, in his right to receive the income and in his enjoyment of it when received. These are rights and privileges which attach to domicil within the State. To them and to the equitable distribution of the tax burden, the economic advantage realized by the receipt of income and represented by the power to control it, bears a direct relationship * * *" (300 U. S. 312, 313).

The above quoted language from *New York ex rel. Cohn* v. *Graves, supra,* substantially adopted in the opinion of the court below (R. p. 47), admirably sums up the reasons for sustaining the tax here challenged.

Petitioner contends in the face of these decisions that Virginia's income tax is in effect a direct tax on the property located in New York and, therefore, invalid because imposed on a subject beyond the jurisdiction of the State, citing *Senior* v. *Braden*, 295 U. S. 422; *Brushaber* v. *Union Pacific Railway Co.*, 240 U. S. 1; and *Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S. 429. The cases cited do not support the contention made.

The tax in *Senior* v. *Braden, supra*, was not an income tax at all, but a property tax on real estate, and it has been very recently so described by this court in *New York ex rel. Cohn* v. *Graves, supra*, in these words:

> "In *Senior* v. *Braden, supra*, on which appellant relies, no question of the taxation of income was involved. By concession of counsel, on which the Court rested its opinion, if the interest taxed was 'land or an interest in land situate within or without the state,' the tax was invalid, and the Court held that the interest represented by the certificates subjected to the tax was an equitable interest in the land. Here (in *New York ex rel. Cohn* v. *Graves*) the subject of the tax is the receipt of income by a resident of the taxing state, and is within its taxing power, even though derived from property beyond its reach" (300 U. S. 316).

And in *Brushaber* v. *Union Pacific Railway Co., supra*, at pages 16, 17 of 240 U. S., this court said of *Pollock* v. *Farmers Loan & Trust Co., supra*, that "the conclusion reached in the *Pollock Case* did not in any degree involve holding that income taxes generically and necessarily came within the class of direct taxes on property." See, also, *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308, 315.

Contrary also to the contention of petitioner, the court below, following its former decisions, has expressly held as to the nature of the challenged tax (R. p. 47):

> "But the tax here under review is of a different nature. In *Hunton* v. *Commonwealth*, 166 Va. 229, 244, 183 S. E. 873, we held that the Virginia income tax is an excise tax and not a property tax; that it is not a tax on the property from which the income is derived, a view subsequently settled in *People of the State of New York* v. *Graves, supra*.
>
> "In no sense is the Virginia income tax levied on any property beyond the jurisdiction of this State. It is a tax levied upon Mrs. Ryan measured by the net income received and enjoyed by her here. She is subject to this tax in Virginia because she resides and is domiciled in this State, because she enjoys the protection of the laws of this State in the receipt and enjoyment of this income, and because she should bear her proportionate part of the expense of the government which affords this protection to her."

The great weight of authority, as represented by decisions of State courts, joins in the view that a net income tax is to be classified as an excise. *Sims*, v. *Ahrens*, 167 Ark. 557; *Stanley* v. *Gates*, 179 Ark. 886; *Waring* v. *Savannah*, 60 Ga. 93, 100; *Featherstone* v. *Norman*, 170 Ga. 370, 379; *Diefendorf* v. *Gallet*, 51 Idaho 619, 627; *Miles* v. *Department of Treasury*, 209 Ind. 172; *Re Opinion of the Justices*, 133 Me. 525, 528; *Hattiesburg Grocery Co.* v. *Robertson*, 126 Miss. 34, 52; *Ludlow-Saylor Wire Co.* v. *Wollbrinck*, 275 Mo. 339, 351; *Bacon* v. *Ranson*, 331 Mo. 985, 990; *O'Connell* v. *State Board of Equalization*, 95 Mont. 91, 112; *Mills* v. *State Board of Equalization*, 97 Mont. 13, 17; *Maxwell*,

Commissioner v. *Kent-Coffey Mfg. Co.*, 204 N. C. 365, 371; *Appeal of Van Dyke*, 217 Wis. 528, 535; 4 Cooley on Taxation (4th Ed.), Sec. 1743.

Likewise this court has made quite clear the distinction between a direct tax on property and a tax on the net income from such property. *New York ex rel. Cohn* v. *Graves, supra*; *New York ex rel. Clyde* v. *Gilchrist*, 262 U. S. 94; *Brushaber* v. *Union Pacific Railway Co., supra.* See especially *Hale* v. *Iowa State Board of Assessment and Review*, ... U. S. ....., decided November 8, 1937, 82 L. Ed. 66, Adv. Ops., and the review of cases contained therein.

It is respectfully submitted that (laying aside the question of double taxation) not only reason and principle, but the decisions of this court directly in point, require that the challenged tax be held to be within the power of Virginia to impose.

B.

THE INHERENT JURISDICTION OF VIRGINIA TO IMPOSE A TAX UPON THE ENTIRE NET INCOME OF A RESIDENT OF THE STATE IS NOT DEFEATED, DIVESTED, OR OUSTED BY THE FACT THE INCOME IS DERIVED FROM A TRUST, THE CORPUS OF WHICH IS MANAGED AND ADMINISTERED IN NEW YORK, AND THAT SUCH TRUST WAS SO CREATED AS TO SUBJECT THE TRUSTEES TO A NEW YORK TAX UPON THE INCOME THEREFROM.

Petitioner denies the above assertion, the argument being that New York has the clear right to tax the trustees on account of the entire net income from the trust, and, having exercised that right, Virginia, therefore, is precluded from imposing a tax on its resident

beneficiary on account of the receipt of a part of the income from the trust. Virginia's tax is bad, says petitioner, because it would constitute double taxation of the same income and double taxation has been condemned by this court in *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194; *Frick* v. *Pennsylvania*, 268 U. S. 473; *Safe Deposit & Trust Co.* v. *Virginia*, 280 U. S. 83; *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204; *Baldwin* v. *Missouri*, 281 U. S. 586; *Beidler* v. *South Carolina*, 282 U. S. 1; and *First National Bank of Boston* v. *Maine*, 284 U. S. 312.

Respondent contends, on the other hand, that it may impose a tax on the entire net income of its resident, even though some of the income may come from property beyond its borders; that this right has been upheld by decisions of this court and that it is not to be denied merely because New York imposes a tax on the income of its resident trustees. Stated differently, due process should not be stretched so as to deny to Virginia the right to tax the net income of its resident for the protection it affords her person, her property, the receipt and enjoyment of her income and for the general advantages of living in the State as a citizen thereof simply because New York chooses to impose a tax on the same income in the hands of its resident trustees for the protection afforded them and the property handled by them.

Petitioner apparently urges that there is some magic in the term "double taxation" to strike down Virginia's tax. But this court has never said that double taxation *per se* is bad; in fact, it has said that the Fourteenth Amendment does not prohibit double taxation. *Cream of Wheat Co.* v. *Grand Forks County*, 253 U. S. 325, 330; *Coe* v. *Errol*, 116 U. S. 517, 524; *Fidelity & C.*

Trust Co. v. *Louisville*, 245 U. S. 54, 59. It has held in *Frick* v. *Pennsylvania, supra*, that due process prohibits the double taxation of tangibles, because they are only taxable by the jurisdiction in which physically located. And in the case of intangibles, *Safe Deposit & Trust Co.* v. *Virginia, supra, Farmers Loan & Trust Co.* v. *Minnesota, supra*, and kindred cases, double taxation has been prevented by the announced doctrine that, as a general rule, they are taxable only at the domicile of the owner. The conclusions of the court, however, in these cases have been based upon definitely announced legal principles and not upon a mere fiat against double taxation.

Virginia's income tax against Mrs. Ryan is not at all inconsistent with the principles laid down by this court relative to the taxation of intangibles. Income in a sense is an intangible and when paid to Mrs. Ryan it is an intangible owned by one domiciled in Virginia. Therefore, applying the rule, Virginia, the domicile of the owner, may tax this intangible.

Before any sweeping constitutional condemnation of double taxation is announced the meaning of that term should be precisely defined so that it may be readily determined whether any particular case comes within its scope. As between the States it is suggested that the ordinary and logical concept of double taxation is represented by a situation where the same legal entity is taxed by more than one State on account of the ownership of the same property or the exercise of the same privilege. The double taxation condemned in the cases relied on by petitioner falls within this concept. In *Union Refrigerator Transit Co.* v. *Kentucky, supra*, the exaction held bad was a tax levied by Kentucky upon tangible property permanently located in an-

other State and taxable there to the same owner. *Frick* v. *Pennsylvania* presents a case where two States imposed a tax on the same property for the same privilege —the testamentary transfer of tangible property. In *Safe Deposit & Trust Co.* v. *Virginia, supra,* identical intangibles were taxed by two States to the same trustee. Likewise, in *Farmers Loan & Trust Co.* v. *Minnesota, supra, Baldwin* v. *Missouri, supra, Beidler* v. *South Carolina, supra,* and *First National Bank of Boston* v. *Maine, supra,* the same intangibles were taxed by two States to the same estate on account of their passage from the dead to the living. But the theory now in effect advanced by petitioner is that, if two taxes levied by two States upon different persons for different privileges even reach the same economic interest, one of them must be condemned for the sole reason that it is "double". The situation in the case at bar is so entirely unlike that existing in any case relied on by petitioner, both factually and on principle, that it is not "double taxation" as that term has been used by this court or as it is generally understood. No prior decision of this court supports such a theory and it is submitted that it is an unsound principle of judicial decision.

Recent decisions of this court have made it plain that in the case of intangibles the validity of a tax thereon imposed by a particular State must depend upon whether there is a legitimate basis for the tax in the taxing State and not upon whether there may be or is a different and sufficient basis for a tax on the same intangibles in another State. Even the line of cases beginning with *Farmers Loan & Trust Co.* v. *Minnesota, supra,* distinctly anticipated the possibility of intangibles acquiring a taxable situs in more than one State. In that case it was said:

> "*New Orleans* v. *Stemple*, 175 U. S. 309; *Bristol* v. *Washington County*, 177 U. S. 133; *Liverpool, etc., Ins. Co.* v. *Board of Assessors for the Parish of Orleans*, 221 U. S. 346, recognize the principle that choses in action may acquire a situs for taxation other than at the domicile of their owner, if they have become integral parts of some local business. The present record gives no occasion for us to inquire whether such securities can be taxed a second time at the owner's domicile" (280 U. S. 213).

Wheeling Steel Corp. v. *Fox*, 298 U. S. 193, definitely recognized business situs acquired in a State other than the State of domicile of the owner as a basis for the taxation of intangibles. This case was followed by *First Bank Stock Corp.* v. *Minnesota*, 301 U. S. 234, wherein was sustained Minnesota's tax on shares of bank stock having acquired a business situs in that State in spite of the argument advanced that the States of incorporation plainly had the right to lay a tax on the shares and had done so. The *First Bank Stock Corporation case* clearly foreshadowed the decision at the last term in *Schuylkill Trust Co.* v. *Pennsylvania*, ... U. S. ....., decided Jan. 3, 1938, 82 L. Ed. 291, Adv. Ops., wherein it was held that a State may tax the shares of a trust company incorporated therein "notwithstanding the ownership of the stock may also be a taxable subject in another State." Thus it is clear that the rule against double taxation on which petitioner principally relies is not an inexorable one even in the case of intangibles. There is still less reason for its application in the case of an income tax under the circumstances here present.

The validity of so-called double taxation of income has

never been before this court for determination. It is submitted, however, that, as has been said, the true test is whether there is a legitimate basis for the imposition of the challenged tax. If there is a legitimate basis for the tax, then it may be imposed and this basis is not made unsound by reason of what another State may do or because such other State may also have a legitimate basis for a tax imposed upon the same income. If there is no legitimate basis for the tax, then it may not be laid, and the fact that no other State taxes the income does not make good a basis which is otherwise bad. As was said by the court below, an analysis of the cases relied on by petitioner shows that each of them turns on the situs of the property taxed, and, where the situs was found to be beyond the jurisdiction of the taxing State, the tax was held to be invalid because there was no legitimate basis therefor. Surely, for the purpose of an excise tax, the situs of income is factually and legally at the domicile of the person who receives it, and this court has said that this is a legitimate basis for the imposition of a net income tax. It is of significance that the income from that part of the trust made available to Mrs. Ryan was payable to her in the sole discretion of the trustees; a part, all or none of the income may have been paid to her in any one year. Virginia has taxed not the whole income made available for her, but only that portion actually received and enjoyed in this State.

If *Lawrence* v. *Mississippi, supra,* and *New York ex rel. Cohn* v. *Graves, supra,* are to be allowed to stand, then Virginia has a legitimate basis for the imposition of its tax against Mrs. Ryan. It is true the record in those two cases did not disclose an income tax levied by any other than the State of domicile, but on principle

the conclusions would not have been different. Will Mississippi's tax, sustained in *Lawrence* v. *Mississippi*, *supra*, become invalid should Tennessee impose a tax (as this court has said in *Shaffer* v. *Carter*, *supra*, it may do) on Lawrence's income from business carried on in that State? Does the validity of New York's tax on the income of its resident from New Jersey real estate (sustained in *New York ex rel. Cohn* v. *Graves*, *supra*) rest upon the insecure foundation of whether or not New Jersey elects to tax such income? Not all of the States impose an income tax. If the validity of the tax upon its residents, otherwise good, of any one of the States that has adopted such a system of taxation is made to depend in any particular case upon the tax statutes of one or more of her sister States, the confusion and uncertainty which would result cannot be estimated. This is all the more obvious when consideration is given to the fact that business is now being transacted on an increasingly national scale.

This court has said that taxation is an intensely practical matter. *Farmers Loan & Trust Co.* v. *Minnesota*, *supra*. If only one state can tax income, a rule must be found by which the proper State can be determined. In the instant case, for example, the two taxes are imposed upon different legal entities for entirely different privileges and protection afforded under the laws of the two States. It is submitted that no principle of taxation nor any decision of this court supports priority in favor of New York. Indeed the cases relied on seem to be in favor of the priority of respondent. Certainly time of assessment should not control, although this record discloses no such priority for either State.

The effect of one phase of petitioner's argument is that income must be traced to its source and there only can it be taxed. Such a doctrine, directly in conflict with decisions of this court holding that the receipt of income by a resident of a State is a "taxable event" as is "universally recognized", must inevitably result in a serious disarrangement of the fiscal policies of the States and especially of those, like Virginia, where the income tax is a substantial source of revenue. Many illustrations of the effect of such a doctrine at once occur.

A Virginia stockholder of a corporation which carries on its business in another State and is taxed there on its income, receives dividends the source of which is, of course, the income of the corporation in such other State. To be consistent, petitioner must say that Virginia may not tax its resident on account of the receipt of these dividends from income which has previously been taxed. The income which Mrs. Ryan received in Virginia in the sole discretion of the trustees is closely analogous to dividends declared by the directors of a corporation and paid to the stockholders.

Again, a resident of Virginia owns stock listed on the New York Stock Exchange. This stock is sold at a profit on the Exchange in New York. The sale being made in New York, the source of the profit is there, and so petitioner would say Virginia cannot impose its income tax on this profit.

Likewise, a resident of one State may earn income from personal services rendered in another. Is the State of domicile to be denied its tax on this income where the source thereof is beyond its borders?

So, also, petitioner must contend that a State may not tax its residents upon income from business carried

on or property located in another State, and that *Lawrence* v. *Mississippi, supra,* and *New York ex. rel. Cohn* v. *Graves, supra,* should both be overruled.

So far as is practicable, the elimination of duplicate taxation of income is manifestly an end to be desired. But this advantageous economic result should not be accomplished by the abandonment of constitutional principles firmly established by prior decisions of this court. It is a matter which should be left to the legislatures of the several States. Virginia has gone far in this direction. Not only do its laws provide a credit under prescribed conditions for income taxes paid other States by its residents (section 39 of Tax Code of Virginia, printed in an Appendix hereto), but they also allow a credit for income taxes paid other States by non-residents who may receive income from Virginia sources. See section 40 of Tax Code of Virginia, also printed in the Appendix. Many other States imposing income taxes have statutes substantially similar to one or both of these Virginia statutes. New York, for example, grants a credit similar to that granted by section 40 of the Virginia Tax Code. Section 363 of New York Tax Laws, Laws of New York, 1921, Chapter 477. Therefore, if New York had taxed *Mrs. Ryan* as a non-resident on account of income she received from the trust, that State would have allowed credit on its tax for the tax paid to Virginia as a resident on the same income. However, *Mrs. Ryan* paid no tax to New York (the tax being laid there on the trustees), and in this particular case the facts were not such as to invoke the reciprocity provisions.

It is respectfully submitted that a net income tax by its nature is in a class by itself and that there is no basis for holding that taxation of income at the domi-

cile of the recipient is within the purview of the rule that tangibles located outside the State of the owner are not subject to taxation within it; nor, due to the nature of the two taxes here involved and the different privileges and protection for which they are imposed, do they come within the scope of the principles pronounced by this court in striking down the double taxation of intangibles. But, irrespective of the validity of the New York tax, the basis of the Virginia tax is the domicile of the recipient of the income, and it is imposed for the protection that she receives under its laws. This court has said that this is a legitimate basis for the tax. Due process of law does not require that this legitimate basis be held bad for the sole reason that another State exercises its right (but not a superior one) to impose a tax upon a different taxpayer for different privileges, using in part the same measuring stick.

III.

Denial of the Equal Protection of the Laws was not Raised or Considered in the Court Below and Should not now be Considered by this Court. In Any Event, Petitioner is not Denied the Equal Protection of the Laws.

A.

DENIAL OF THE EQUAL PROTECTION OF THE LAWS WAS NOT RAISED OR CONSIDERED IN THE COURT BELOW AND SHOULD NOT BE CONSIDERED FOR THE FIRST TIME IN THIS COURT.

On page 24 of brief in support of the petition for a writ of certiorari counsel for petitioner alleges that the

Virginia tax is invalid because denying Mrs. Ryan the equal protection of the laws contrary to the provisions of the Fourteenth Amendment. This question has not been previously raised or considered in this case. It does not appear in the record and the lower court did not pass upon it.

In the court below the only Federal question was presented by counsel for petitioner in the following manner (R. p. 15):

> "Second. The assessment here if justified under the Virginia law would be contrary to the provisions of the Fourteenth Amendment to the Federal Constitution.
>
> "The Fourteenth Amendment is what is usually referred to as the Due Process Clause. This point depends upon Federal decisions and the *situs* of the income for taxation purposes."

The only Federal question raised and certainly the only Federal question considered or decided appears from the lower court's opinion (R. p. 49) from which the following is quoted:

> "What we do decide and all we decide is that the domicile and residence of Mrs. Ryan in the State of Virginia is sufficient to sustain the validity of the tax levied against her by this State."

The opinion of the lower court showed the issues to be, on page 43 of the Record, as follows:

> "Relief from the taxes is sought on two grounds:
>
> "(1) The Virginia statutes are not designed and intended to tax such income; and

"(2) If the tax is within the Virginia statutes the assessment violates the due process clause of the Fourteenth Amendment to the Federal Constitution."

Hence this court should not consider the question now.

Saltonstall v. *Saltonstall*, 276 U. S. 260, 268;
Silver v. *Silver*, 280 U. S. 117, 122;
Northwestern Bell Telephone Co. v. *Nebraska State Ry. Commission*, 297 U. S. 471, 473;
Susquehanna Power Co. v. *State Tax Comr. of Maryland*, 283 U. S. 291, 297;
Aero Mayflower Transit Co. v. *Georgia Public Service Comn.*, 295 U. S. 285, 294.

B.

IN ANY EVENT THE VIRGINIA TAX DOES NOT DENY TO PETITIONER THE EQUAL PROTECTION OF THE LAW.

While it is difficult to follow petitioner's rather vague and involved argument as it is found on pages 24 and 25 of its brief, apparently the point is made that the New York and Virginia laws with respect to estates are similar; that, if the trust in question had been a Virginia trust, both Mrs. Ryan and the trustees would have been subject to a Virginia tax on the same income; but that, if Mrs. Ryan had been an "ordinary beneficiary", she would not have been subjected to this double tax whether she received the income from a New York trust or from a Virginia trust.

The short answer to this argument that is sufficient is simply that this court does not deal in hypothetical cases and there is no such case in reality before the court

now. *Roberts & Schaefer Co.* v. *Emmerson*, 271 U. S. 50, 54.

In order to show the imaginary discrimination, counsel invokes a construction of the Virginia statutes dealing with the taxation of estates and trusts *all his own*. The court below has not so construed the statutes and counsel point to no decision of any Virginia court so construing them. While it does not appear that a discussion of what would have happened if this had been a Virginia trust has the slightest bearing on any issue involved here, yet, if this had been the case and the payment of the income to the beneficiary was in the discretion of the trustee, the income tax would have been paid by the trustee and not by the beneficiary; but if the payment of the income was required by the terms of the trust to be made to the beneficiary, Mrs. Ryan, periodically, without discretion in the trustees, the tax thereon would be paid by the beneficiary and not by the trustee. See section 50 of the Tax Code of Virginia, Michie's Code of Virginia, 1936, p. 2410, printed in the Appendix. In short, if a Virginia trust were involved, only one tax would be imposed on the income therefrom, payable in the case of a "discretionary trust" by the trustee, and in the case of an "ordinary trust" by the beneficiary.

It is entirely clear that Mrs. Ryan and all persons similarly situated are taxed alike under Virginia law, and there is nothing in this record or the statutes to show the denial of the equal protection of the laws.

CONCLUSION

For the reasons advanced it is respectfully submitted that:

(1) The writ of certiorari should be dismissed because the petition was not filed within the time required by law; and

(2) No right, title, privilege or immunity under the Fourteenth Amendment of the Constitution of the United States has been denied to petitioner.

Respectfully submitted,

ABRAM P. STAPLES,
Attorney General of Virginia,
W. W. MARTIN,
Assistant Attorney General.
Counsel for Respondent.

Richmond, Virginia,
September 15, 1938.

APPENDIX

TAX CODE OF VIRGINIA

"Sec. 24. Definition of gross income.—The term 'gross income', as used herein, includes gains, profits and income derived from salaries, wages or compensation for personal services of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales or dealings in property, whether real or personal, growing out of the ownership, or use, or interest in such property; also from rent, interest, dividends, securities or transactions of any business carried on for gain or profit, or gains or profits and income derived from any source whatever, including gains or profits and income derived through estates or trusts by the beneficiaries thereof, whether as distributive or as distributable shares. * * *" (Michie's Code of Virginia, 1936, p. 2404).

"Sec. 27. Net income defined.—The term 'net income' means the gross income of a taxpayer less the deductions allowed by this chapter; but the net income subject to the taxes imposed by this chapter shall be the net income less the personal exemptions allowed by this chapter." (Michie's Code of Virginia, 1936, p. 2405).

"Sec. 38. Individual income tax rates; residents and nonresidents.—A tax is hereby annually levied for each taxable year upon every resident individual of this State, upon and with respect to his entire net income as herein defined for purposes of taxation, at rates as follows:

"One and one-half per centum of the amount of such net income not exceeding three thousand dollars;

"Two and one-half per centum of the amount of such net income in excess of three thousand dollars, but not in excess of five thousand dollars; and

"Three per centum of the amount of such net income in excess of five thousand dollars. * * *" (Michie's Code of Virginia, 1936, p. 2407).

"Sec. 39. Credit for taxes paid other States by resident individuals of this State.—Whenever a resident individual of this State has become liable to income tax to another State upon his net income, or any part thereof, for the taxable year, derived from sources without this State and subject to taxation under this chapter, the amount of income tax payable by him under this chapter shall be credited on his return with the income tax so paid by him to such other State upon his producing to the proper assessing officer satisfactory evidence of the facts and of such payment. The credit provided for by this section shall not be granted to a taxpayer when the laws of another State, under which the income in question is subject to tax assessment, provide for a credit to such taxpayer substantially similar to that granted by section forty of this chapter. * * *" (Michie's Code of Virginia, 1936, p. 2408).

"Sec. 40. Credit for taxes paid other States by nonresident individuals.—Whenever a nonresident individual of this State has become liable to income tax to the State where he resides upon his net income for the taxable year, derived from sources within this State and subject to taxation under this chapter, the amount of income tax payable by him under this chapter shall be credited with such proportion of the tax so payable by him to the State where he resides as his income subject to taxation under this chapter bears to his entire income, upon

which the tax so payable to such other State was imposed; provided, that such credit shall be allowed only if the laws of said State (1) grant a substantially similar credit to residents of this State subject to income tax under such laws or (2) impose a tax upon the personal incomes of its residents derived from sources in this State and exempt from taxation the personal incomes of residents of this State. No credit shall be allowed against the amount of the tax on any income taxable under this chapter which is exempt from taxation under the laws of such other State." (Michie's Code of Virginia, 1936, p. 2408).

"Sec. 50. Estates and trusts.—1. The tax imposed by this chapter upon individuals shall apply to estates and trusts, which tax is hereby levied annually upon and with respect to the income of estates or of any kind of property held in trust, including:

* * * * * *

"d. Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, * * *.

* * * * * *

"3. In cases under paragraphs a, b and c of subdivision one, of this section, the tax shall be imposed upon the estate or trust with respect to the net income of the estate or trust and shall be paid by the fiduciary, * * *. In such cases, the estate or trust shall be allowed the same exemption as is allowed to single persons by this chapter, and in such cases an estate or trust created by a person not a resident, and an estate of a person not a resident shall be subject to tax only to the extent to which individuals other than residents are liable under this chapter.

"4. In cases under paragraphs d and e of subdivision one of this section, if the distribution of

income is in the discretion of the fiduciary, either as to the beneficiaries to whom payable or as to the amounts to which any beneficiary is entitled, the tax shall be imposed upon the estate or trust in the manner provided in subdivision three of this section, but without the deduction of any amounts of income paid or credited to any such beneficiary. In all other cases under paragraphs d and e of subdivision one of this section, the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary his distributive share, whether distributed or not, of the net income of the estate or trust for the taxable year, * * *." (Michie's Code of Virginia, 1936, p. 2410).

pp. 1 - 2

SUPREME COURT OF THE UNITED STATES.

No. 9.—October Term, 1938.

Guaranty Trust Company of New York, Executor of the Estate of Mary T. Ryan, Deceased, Petitioner, vs. Commonwealth of Virginia.

On Writ of Certiorari to the Supreme Court of Appeals of Virginia.

[November 7, 1938.]

Mr. Justice McReynolds delivered the opinion of the Court.

Mrs. Mary T. Ryan, while resident and citizen of Virginia in 1930, 1931 and 1932, was beneficiary of a trust set up under the will of her husband, Thomas F. Ryan, who died when a citizen of New York in 1928. The will was probated in New York; the trustees qualified there, took over the assets and have kept them there. The trust has been administered and accounts settled under the laws of that state.

The will divided the estate into fifty-four parts and directed payment of the income therefrom to designated beneficiaries. These are the provisions presently important—

> Twelve (12) of said equal parts to said Trustees in trust to receive the income therefrom, and to pay over such part of said income to my dear wife, Mary T. Ryan, as they in their sole discretion may determine to be necessary and proper for her care, support and comfort during her life, in such installments and at such intervals as they in their sole discretion may determine.

The will further provided that the trustees should "divide any surplus income from said twelve parts not paid to my wife as aforesaid, into forty-two equal portions, and to pay such surplus income in equal quarterly payments as near as may be" to certain distributees as designated in said will, and that upon the death of the said wife the principal amount of the said twelve equal parts should be divided and distributed to certain designated distributees, as set out in said will.

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The New York and Virginia statutes laying taxes upon incomes from trusts are substantially alike. They require trustees to report income received and where the trust is discretionary to pay the amount assessed upon the entire income; if the trust is an ordinary one each beneficiary is assessed upon the amount received by him.

For 1930, 1931 and 1932 New York in one or both of these ways received taxes upon the entire income of the trust set up under the will. Exercising their discretion, after satisfying the taxes, the trustees paid to Mrs. Ryan considerable sums out of the income, from twelve fifty-fourths of the estate—in all approximately $300,000. For the same years Virginia assessed ordinary state income taxes against her on account of the sums so received. They were paid and this proceeding was begun in the circuit court of Nelson County to recover them. It sustained the tax and the highest court of the state affirmed the judgment. The matter comes here by certiorari granted upon the following statement—

> This petition presents the issue as to whether the State of Virginia has the right, under the provisions of the Fourteenth Amendment to the Constitution of the United States, to assess an income tax on income received by the said Mary T. Ryan for the years in question, when the identical income in the hands of her Trustees had been assessed with income taxes by the State of New York, and which said taxes had been paid there, thus imposing two State taxes on the same income.

Counsel for petitioner submits—.

The same income was subjected to taxation by two states. New York unquestionably had the right to exact the tax upon the income of the trust, and thereby Virginia was inhibited. The provisions of the Fourteenth Amendment protect against such taxation by two states on the same income. Here, both the Equal Privilege and the Due Process clauses forbid the challenged exactment.

The claim that equal protection has been denied seems to rest upon an assumed literal construction of the Virginia statute which would require income from discretionary trusts to be taxed against both trustee and beneficiary, while only one tax (against the beneficiary) would fall upon income from ordinary trusts.

We must, of course, deal with rights here actually involved. The ate has made one assessment against a resident beneficiary be- use of inco received within her jurisdiction and her courts ve approved. They have not interpreted her statutes according the petitioner's assumption.

The right to recognize a distinction between ordinary and dis- etionary trusts and thus insure collection of taxes upon the entire come actually received from the latter seems clear enough.

Has there been denial of Due Process—

The insistence is that the challenged assessment was upon the entical income already rightly taxed by New York; that under merous decisions by us two or more states may not tax the me subject; this would amount to double taxation and infringe e Due Process clause. To support this proposition the cases oted in the margin[1] are cited.

Those cases go upon the theory that the taxing power of a state restricted to her confines and may not be exercised in respect of bjects beyond them. Here, the thing taxed was receipt of in- me within Virginia by a citizen residing there. The mere fact at another state lawfully taxed funds from which the payments ere made did not necessarily destroy Virginia's right to tax mething done within her borders. After much discussion the pplicable doctrine was expounded and applied in *Lawrence* v. *tate Tax Commission*, 286 U. S. 276, and *New York ex rel. Cohn* v. *raves*, 300 U. S. 308. The attempt to draw a controlling distinc- on between them and the present cause, we think has not been uccessful.

The challenged judgment must be

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[1] Union Refrigerator Co. v. Kentucky, 199 U. S. 194, Frick v. Pennsylvania, 68 U. S. 473, Safe Deposit & Trust Co. v. Virginia, 280 U. S. 83, Farmers oan & Trust Co v. Minnesota, 280 U. S. 204, Baldwin v. Missouri, 281 U. S. 86, Beidler v. S. Carolina Tax Commission, 282 U. S. 1, First National Bank f Boston v. Maine, 284 U. S. 312, Senior v. Braden, 295 U. S. 422.